

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NXIVM CORPORATION, et al.,
Plaintiffs,
vs.
ROSS INSTITUTE, et al.,
Defendants.

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Case No. 2:06-cv-01051
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Newark, New Jersey
September 13, 2010
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TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MARK FALK
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings at 11:13 a.m.)

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3 THE COURT: It is the case of NXIVM versus -- et
4 al., versus Sutton, et al. It's Docket 06-1051. And would
5 counsel be kind enough to place their appearances on the
6 record.

7 MR. McGUIRE: William B. McGuire, Tompkins,
8 McGuire, Wachenfeld & Barry on behalf of plaintiffs NXIVM and
9 Salzman. To my right is Robert Crockett, Latham & Watkins,
10 LA office, representing Kristin Keeffe. He's been admitted
11 pro hac vice, but I think this is the first time he's been in
12 court here.

13 MR. CROCKETT: Good morning, Your Honor.

14 MR. LEONARD: Good morning, Your Honor. Robert
15 Leonard, Drinker Biddle & Reath for Keith Raniere.

16 THE COURT: Good morning.

17 MR. SYLVESTER: Good morning, Your Honor, Anthony
18 Sylvester from Riker Danzig on behalf of Mr. Sutton,
19 Mrs. Sutton, and Ms. Franco. And with me at counsel table is
20 Mr. Kofman from my office. Thank you.

21 MR. KOFMAN: Good morning, Your Honor.

22 MR. SKOLNIK: Good morning, Your Honor, Peter
23 Skolnik, Lowenstein Sandler. With me is Tom Dolan of
24 Lowenstein Sandler. We're here on behalf of Rick Ross, the
25 Ross Institute, the Wellspring Retreat, and the estate of the

1 late --

2 MR. LANDY: Good morning, Your Honor, Robert Landy
3 and Benjamin Holzer from Friedman Kaplan Seiler & Adelman LLP
4 for Interfor Incorporated, Juval Aviv.

5 THE COURT: Good morning. And welcome.

6 Mr. Skolnik, it -- my clerks are telling me that it
7 would be good if when you speak, you get closer to a
8 microphone, because you're -- you're not being picked up on
9 our -- so clearly. So ...

10 MR. SKOLNIK: Usually I'm accused of speaking too
11 loud and too fast.

12 THE COURT: I've got you.

13 All right. This is a case management conference
14 with a number of purposes. One, there are certain
15 outstanding discovery disputes. There is also a formal
16 motion for a protective order out there. And, third, we have
17 recently received a letter from Mr. Crockett on September 10,
18 dealing with additional discovery that will be sought.

19 Beyond that, I've informed all of you before we
20 went on the record that I met with District Judge Cavanaugh
21 this morning and that he has -- given that this case is
22 perhaps eight years or so old -- of course, it was
23 transferred from another district -- it is one of the oldest
24 cases on his docket. It is a case where we start to get a
25 little attention and some ticklers from the Third Circuit in

1 Washington about the age of the case. He has instructed me
2 to let you know that, to let you know that he feels that
3 we've been very liberal in terms of allowing discovery in
4 this case, a case which, in my view, is somewhat unique and
5 has many different facets to it. But that at the conclusion
6 of our meeting today, we will set a discovery end date, a
7 fact discovery end date that will be set in stone, absent of
8 course some incredible emergency. But this will be a date
9 that will end discovery once and for all, fully and finally.
10 And presumably, we will follow with dispositive motion
11 practice after that, and to the extent what happens there, a
12 final pretrial and a trial. So that is a little summary of
13 our meeting today.

14 And I should say, yeah, I had also received
15 Mr. Sylvester's letter asking -- requesting assistance in
16 completing fact discovery in the case. And we will do our
17 best at this point.

18 What I'd like you to do is -- or I'd like to do now
19 is I'm going to let the parties raise the issues that they
20 feel are outstanding, and I will attempt to address them.

21 You want to start first, Mr. McGuire?

22 MR. MCGUIRE: Judge, our request is that -- we
23 agree with you a discovery end date should be established.
24 No question about that. We believe as a practical matter,
25 with the number of depositions that we have described in

1 Mr. Crockett's letter, which are some 20 in number -- and
2 depending upon the Ross deposition, there could be others;
3 maybe there won't be. But we think that many of these
4 persons are going to have subpoenaed and agree-to dates are
5 going to have to be established with them, as a result of
6 which, we believe that it is reasonable to ask that the
7 discovery end date be sometime the end of March or so of next
8 year, because inevitably, there are going to be problems with
9 some of these persons, getting them to a deposition.

10 I should add that there's one person whose name was
11 inadvertently left off. I've just spoken with Mr. Sylvester
12 a few minutes ago. Stephanie Franco's deposition remains to
13 be completed. That should be a day deposition at most.

14 THE COURT: Right.

15 MR. MCGUIRE: But our position is set forth in
16 Mr. Crockett's letter. We don't disagree that dispositive
17 motion practice will be essential in this case. And we're
18 prepared to address any questions Your Honor might have for
19 us.

20 THE COURT: All right. I'll say that that time
21 frame is rather expansive, but it's a time frame that I did
22 discuss with the district judge, and it's not -- it's not out
23 of the question.

24 But I think why don't we deal first with Mr. Ross's
25 deposition because I think a lot may flow from that.

1 MR. MCGUIRE: Yes, Your Honor.

2 THE COURT: So why don't we deal with that first.
3 So you've taken two days of that; right?

4 MR. SKOLNIK: No, Your Honor.

5 THE COURT: Oh, no.

6 MR. SKOLNIK: They've taken three days.

7 THE COURT: Three days.

8 MR. SKOLNIK: And I think it's important to put on
9 the record, because counsel on this side of room have -- have
10 gotten used to misrepresentations from Mr. Crockett in
11 communications among counsel. It's a little bit more unusual
12 when those misrepresentations extend to his communications
13 with the Court. And let -- let me read to you what he says
14 is the summary of their position: In summary, because we
15 have not been able to ask very many questions of Rick Ross --
16 he abruptly walked out of his deposition, and his attorney
17 declined to remain in the conference room so that we can
18 consult with Your Honor -- we have been frustrated in our
19 ability to ascertain the nature of his counterclaim or
20 defenses.

21 Well, if Your Honor will remember, the event that
22 Mr. Crockett is referring to there about walking out of the
23 deposition was after Day 2. There was then a Day 3. His
24 statement "we have not been able to ask very many questions
25 of Mr. Ross," Mr. McGuire questioned Mr. Ross for two full

1 days and a part of that third. Mr. Crockett questioned
2 Mr. Ross for the balance of that third. And this is how the
3 end of that third day was, Your Honor. I'm reading from the
4 transcript now. There had been some discussion about some
5 files.

6 Question: Well, if you didn't purge the files
7 after hearing of the Interfor report, then you must have
8 those files.

9 Answer: I very likely may have those files. I'm
10 not sure.

11 Question: I'm going to ask for the specific pages
12 of your records that you say you tied to the report.

13 Then I say: You will include that in your letter?

14 This is to Mr. Crockett.

15 Mr. Crockett: Sure. I have no further questions.

16 Okay. I have no further questions. Not "I have no
17 further questions today." "I have no further questions."
18 This after questioning Mr. Ross for the best part of an
19 entire day.

20 And now he says to you, we have not been able to
21 ask Mr. Ross very many questions.

22 So I think it's important that Your Honor
23 understand that this is the nature of what we are dealing
24 with all the time in this case. You know, I have -- I have
25 frequently shared the opinion that this is an interesting

1 case. There certainly are some interesting things about it.
2 I mean it's very interesting that one of the plaintiffs is a
3 man who insists on a week of celebration for his birthday,
4 not six days -- four. You know, I mean, that's a very
5 interesting thing. There are interesting things about this
6 case. It used to be interesting to me. Now, it has become
7 simply of aggravating because of having to deal with this
8 kind thing on a -- on a daily basis with these people.

9 So, you know, let's -- let's deal with the issue.
10 I mean if -- I had not anticipated that we would have oral
11 argument on my pending motion this morning. But if that's
12 what -- if that's what you wanted, you know, so be it.

13 THE COURT: Well, I -- to be quite frank -- and I
14 reread the papers over the weekend -- I mean your motion --
15 and I understand how you feel; I'm not saying whether it's
16 justified or not justified, but a certain level of
17 frustration and aggravation comes across.

18 But the fact of the matter is that the motion for a
19 protective order, which is one that we -- that followed a
20 discussion of letters and disputes, but the motion is a very
21 expansive one. And I -- I don't believe that there is a
22 basis for imposing sort of a blanket protective order against
23 discovery in this case. And I -- being very familiar with
24 the standards for a protective order, based on allegations
25 that are disputed by the other side and perhaps

1 unsubstantiated; in other words, I mean, part of your motion
2 goes to the fact that the plaintiffs, or some of them, do --
3 do bad things, shall we say, or are using litigation for
4 other purposes or harass people, thing -- and it's too broad,
5 and I don't have a basis for that.

6 So what I thought is not so much oral argument, is
7 we go more specifically to the specific issues in the Ross
8 deposition, and I will try to decide those right now, rather
9 than this just broad protective -- even what you just read to
10 me, I mean that's not something that I don't think was in
11 your papers.

12 MR. SKOLNIK: No. This came up afterwards.

13 THE COURT: Okay. But I meant the --

14 MR. SKOLNIK: This came up afterwards.

15 THE COURT: -- the way -- the way the Skolnik --
16 I'm sorry, the Ross deposition ended, I'm not sure if that
17 was in there. There may be at some point there were --

18 MR. SKOLNIK: No, Your Honor. There was --

19 THE COURT: -- in some letters, I have no further
20 questions --

21 MR. SKOLNIK: -- because my papers were filed in
22 April.

23 THE COURT: But in any event, why don't we go to
24 the specific issues. So in other words, because there were
25 issues that are in dispute. And I'm prepared to deal with

1 those. So why --

2 MR. SKOLNIK: And I think actually the issues that
3 are in dispute are really fairly narrow.

4 THE COURT: Okay. I think so too.

5 MR. SKOLNIK: I mean there were four -- there were
6 four issues that were -- that were raised in the papers --

7 THE COURT: Right.

8 MR. SKOLNIK: -- because if you remember, this
9 issue was initially raised by Mr. McGuire in a letter seeking
10 to compel, and then there was a telephone conference with
11 Your Honor where you suggested that instead of him filing a
12 motion to compel, I should file a motion for a protective
13 order.

14 THE COURT: True.

15 MR. SKOLNIK: But there were four issues. One of
16 them was this -- this Joseph Stillwell [phonetic] question.
17 And I then submitted something *in camera*. And I think that
18 that is now off the table. I think everybody now recognizes
19 that that's not even out there anymore.

20 THE COURT: I read --

21 MR. SKOLNIK: But let's deal with the first two,
22 because they're the most significant. Both of them relate to
23 Mr. Ross's unwillingness to identify people who contacted him
24 about NXIVM. Okay. In most instances, I would -- I would
25 almost say in every instance, we are talking about

1 | communications with Mr. Ross that were made in confidence and
2 | with the assumption of confidentiality and anonymity after
3 | this case was filed. Therefore, there is not only the issue
4 | of the fact that NXIVM has a well documented history of
5 | harassing and pursuing its critics, there's not -- there is
6 | not merely that. There is not merely the fact that these
7 | people are entitled to protection under the federal rules
8 | that protect people from unnecessary harassment and burden.

9 | There is also the fact that by definition, because
10 | these were communications after this case was filed, that
11 | those communications could have absolutely nothing whatsoever
12 | to do with the issues that remain in this case. So that
13 | really -- that really is the heart of the major part of my
14 | motion for a protective order.

15 | The fourth issue was -- was this issue of
16 | Mr. McGuire at first and then Mr. Crockett trying to force
17 | Mr. Ross to say on the record that he refused to take down
18 | the Hochman [phonetic] report. Mr. Ross made it very clear
19 | on the record in response to questions that when requests to
20 | take down the Hochman report came to him, he turned them over
21 | to counsel and that the fact that they now remained on the
22 | website was a function of his communications with counsel.
23 | That should be the end of the story. To get Mr. Ross to say
24 | "I refused" so that they can wave that in his face in front
25 | of a jury is thoroughly inappropriate. They now know

1 everything they need to know on that. The article is on the
2 website. Mr. Ross received and read the letters that asked
3 him to take it down. The article remains there. Between the
4 receipt of the letters and the fact that the article remains
5 there, he communicated with me. That is the answer to
6 everything here. There is no need to allow them to continue
7 to pursue and insist that Mr. Ross say either what it is that
8 he and I discussed that resulted in the articles remaining
9 there, or to admit that he, quote, refused. Because, in
10 fact -- in fact, I will say because it's -- that my advice
11 had nothing to do with a refusal. My advice has to do with
12 copyright issues and who it was that had the right to ask
13 that this document be removed.

14 THE COURT: Well, let's deal with that, then. I
15 mean, I'm prepared to rule on it at the moment, but I'd be
16 happy to hear from the other side, if you want to talk about
17 that.

18 MR. MCGUIRE: Judge, let me -- excuse me, let me
19 start by just saying a few things in response to
20 Mr. Skolnik's assertions.

21 Number one, we did not have three full days with
22 Mr. Ross. I advised Mr. Skolnik, memory serves correctly, on
23 September 21 of last year that I was committed to a birthday
24 party for Cardinal McCarrick in New York City. It was
25 beginning at 5 o'clock. I would have to leave no later than

1 3:00. If he had a problem with that, we'd call you.

2 I was not finished. Mr. Skolnik took the position
3 I don't think any other attorney in the state would have
4 taken that nobody could continue, nobody could ask another
5 question, even though Mr. Crockett and Mr. Leonard were
6 prepared to ask additional questions. He stormed out of the
7 room, leaving Mr. Dolan behind. We tried to locate him; he
8 was hidden someplace. He found out Mr. Dolan was in the room
9 and instructed Mr. Dolan to leave the room so that no one was
10 available to speak with Your Honor. That, to me, was highly
11 inappropriate conduct. The deposition could have continued
12 until 5 o'clock, if not later, with other counsel
13 participating. So for him to say that we had three full days
14 of Mr. Ross was simply not so.

15 Now, addressing the present situation, Mr. Skolnik
16 just made a remark, if I understood him correctly, that he
17 did not give Mr. Ross any advice on whether to take that
18 down. So we don't have any attorney-client privilege. He
19 keeps talking an attorney. But my understanding of
20 attorney-client privilege is when an attorney [sic] receives
21 advice or seeks advice. The factual issues are not subject
22 to an attorney-client privilege. For example, a lawyer can
23 say to a client when -- what's the date of that deposition or
24 what newspaper did you read or this or that; that's not
25 asking for advice. That can be inquired -- and that's what

1 this is all about. We're entitled to know why Mr. Ross
2 refused to take those articles or statements on his website
3 down after persons who were in possession of those rights,
4 asked him to do so. It's a simple question, as far as I'm
5 concerned; I don't think it requires a great deal of
6 argument.

7 So if you're just addressing that one issue right
8 now, it appears to me that that's an open-and-shut question
9 and we should be allowed to ask those questions.

10 Am I correct, I'm not supposed to get involved in
11 any other issues right now?

12 THE COURT: Yeah, let's just deal with that right
13 now.

14 MR. McGUIRE: That's fine, Judge.

15 THE COURT: Frankly, I'm only dealing with one
16 question. I don't know about other questions. But go -- go
17 ahead, Mr. Skolnik.

18 MR. SKOLNIK: Yeah, Mr. McGuire said that perhaps I
19 misunderstood Mr. Skolnik. In fact, he did misunderstand
20 Mr. Skolnik. I did not -- I -- what I said was that the
21 nature of my discussions and my advice to Mr. Ross were not
22 that he refused to take down the information. I don't know
23 that it is either necessary or appropriate for me to go into
24 detail about the nature of those conversations. But they
25 dealt with legal issues and with questions about whether or

1 not he should, whether or not he was required to, all of that
2 was the subject of discussions. And the result was that the
3 article remained on the website. The questions that
4 Mr. McGuire is now saying he wants to ask are not the ones
5 that he was asking. He was doggedly asking Mr. Ross to agree
6 that he refused to take the article down from the website.
7 That was only issue in his letter.

8 THE COURT: And, frankly, is the only issue in the
9 motion. In other words, there was -- there was one question,
10 that the colloquy was there. As far as I'm concerned, that
11 question is not improper. It does not implicate the
12 attorney-client privilege. It could be that follow-up
13 questions would. I don't think it's appropriate for you to
14 disclose or for counsel to ask what the nature of the legal
15 advice was or wasn't, unless, indeed, there's some argument
16 of waiver.

17 But really what the question is, he got letters
18 from another lawyer -- or from outside lawyers. I don't know
19 that I've ever seen those letters; I don't remember them at
20 this point. And then he refused to take the article down.
21 So -- his objection, I guess, or your objection is mainly
22 attorney-client privilege. If you really focused it from any
23 vantage point, it would be -- one could say that, you know,
24 perhaps forcing the use of the word "refuse" would be
25 argumentative. But we're dealing with a cross-examination

1 situation, and I -- if I was presiding over it at trial and
2 this is the deposition, I would allow leeway with a
3 questioning witness, and I'm sure that Mr. Ross, if he feels
4 that the word "refused" did not accurately describe what --
5 what occurred, he could handle the -- the question. But what
6 happened here was there was a direction not to answer the
7 question.

8 And I'm going to overrule that and permit that
9 question to be asked and answered.

10 Now, this may proceed. The follow-up questions
11 which aren't before me, I'm going to have to leave to you
12 folks. We do have an attorney-client privilege. It's
13 respected. And I don't know if those questions -- the
14 follow-up questions Mr. McGuire intends to ask would encroach
15 on that. I'm happy to talk about it with you folks.

16 But as far as I'm concerned, that question itself
17 did not disclose the substance of attorney-client privileged
18 information. And really, I think if we're all honest about
19 it, it had to do with whatever implications attached to the
20 word "refused." But, you know, on cross-examination -- and
21 this is essentially that -- the parties are given the --
22 some -- some leeway to make argumentative-type questions. I
23 mean, if it gets out of hand, I'm not going to let him harass
24 the witness about "refused," but I think the question should
25 be answered.

1 MR. SKOLNIK: All right. And -- and as I
2 understand, Your Honor, Mr. Ross need not subscribe to the
3 word "refused."

4 THE COURT: Well, I -- I can't say that someone
5 can -- has to or can't or can, I mean --

6 MR. SKOLNIK: That's fine.

7 THE COURT: -- but I -- he certainly can ask the
8 question and follow it up, and it should be answered.

9 MR. SKOLNIK: That's fine, Your Honor.

10 THE COURT: I can't say what a -- I can't say what
11 a witness will say or should say. So, that should be
12 answered.

13 Yes, sir.

14 MALE SPEAKER: Your Honor, should I go next?

15 THE COURT: If you like.

16 MALE SPEAKER: Why not.

17 THE COURT: We still have the other big issue of
18 these folks who had contacted -- or allegedly contacted Ross
19 at some point.

20 MALE SPEAKER: If you want to deal with that,
21 that's fine.

22 THE COURT: Do you want to do that one, first? And
23 I guess Mr. -- I don't know if it was Mr. Crockett or
24 Mr. McGuire is going to argue. I mean it seems to me that
25 the argument here is that, as I recall, the -- there was --

1 Mr. Ross may have taken the position that he would -- denied
2 that he was aware that certain materials were confidential.
3 This was put forth as the basis for the -- for wanting to
4 question people that he spoke to. And I think that, given
5 what I know about the case, folks who contacted Mr. Ross
6 prior to the publication of the article or articles on the
7 website, should be disclosed, and I think that's appropriate.

8 I think that Mr. Skolnik's argument about people
9 who contacted Rick Ross after the publication of the articles
10 is probably not relevant. And the plaintiffs' claims in this
11 case are misappropriation of trade secrets against all
12 defendants, breach of contract against defendant Franco
13 dealing with the confidentiality agreement, and sort of a
14 tortious interference with contract against Ross, Ross
15 Institute, and the Suttons, and I do not see how persons who
16 contacted Ross or complained to Ross after the events of the
17 publication are sufficiently relevant in this case. And I
18 think that that really gets into fishing expedition and
19 otherwise.

20 Now, I have made that statement before I gave you a
21 chance to say anything, Mr. McGuire or Mr. Crockett. But --
22 so I'll be happy to hear you. But, I must say that I feel
23 fairly strongly about that.

24 MR. CROCKETT: Your Honor, one of the elements of a
25 trade secret case is the damage that occurred by reason of

1 the theft of the trade secrets. And to the extent Mr. Ross
2 used the stolen materials to further damage NXIVM is relevant
3 to our case. In other words, we're interested in the
4 knowledge from these third-party contacts after the material
5 was stolen as to whether that material was used with these
6 third-party contacts, discussed with them, whether any
7 additional materials were obtained from these third-party
8 contacts. So we're looking for the same pattern, the same
9 event that occurred when the material was stolen. Did he
10 take more material? Did he discuss material with them? Did
11 he share material with them? Did he profit from the stolen
12 material by deriving money from these people and treating
13 them? I mean that goes directly to the heart of the damage
14 question.

15 So what happens in a typical trade secret case is
16 you steal material or you publish it, and then you -- then
17 you derive benefit from it. And the way you derive benefit
18 from it is you get referrals and people come and talk to you
19 and they send you business. And that's part of the case we
20 have to establish: Did he benefit from the publication of
21 that material?

22 THE COURT: And I appreciate that. And, you know,
23 intellectually, I think it's a legitimate argument. But
24 practically, that would leave us in an unlimited discovery
25 situation. You could have -- in other words, it really is

1 sort of a fishing expedition. You could -- we could have him
2 questioned about every person he ever speaks to anywhere,
3 anytime. I believe I saw in the paperwork a statement by
4 Mr. Ross -- and I could be wrong, I may get myself in trouble
5 with this, but that -- that he had only been retained by the
6 Suttons. Is that wrong, by the way?

7 MR. SKOLNIK: No. That's not wrong, Your Honor.

8 THE COURT: So, then, I don't think -- you know,
9 other than sort of -- sort of unquantifiable benefits that he
10 might have gotten from talking to other people or generating
11 publicity, I just think that's too far afield. And I think
12 that at that point, we're -- we're really into fishing
13 expedition. We don't have any specific information that
14 would allow that kind of open-ended questioning, of just
15 taking his telephone logs and starting to go down them and
16 saying, well, what did you say -- what did you say to this
17 one, this one, this one. That has no end. And I'm going to
18 limit it that way. And that's after due consideration.

19 MR. SKOLNIK: Your Honor.

20 THE COURT: Yes, sir.

21 MR. SKOLNIK: I just wanted -- I just wanted to
22 point out that all of the -- Mr. Ross, through discovery,
23 both written discovery and at deposition, has already
24 identified all contacts concerning NXIVM prior to the
25 publication. So the only issue that was remaining open was

1 the post publication, which I understand Your Honor has now
2 ruled on.

3 Let -- let me also say, because I guess it's
4 significant in terms of the way this case proceeds and the
5 way we all and the Court thinks about it -- I mean, putting
6 aside, I lost count of the number of times Mr. Crockett
7 referred to the material that Mr. Ross stole. I -- I'm sure
8 you remember that, in fact, Mr. Ross got this material from a
9 member of the Sutton family. He didn't steal it, and the
10 people from whom he got it did not steal it. But put that
11 aside.

12 The law does not say, as Mr. Crockett just said,
13 that the benefit that Mr. Ross may or may not have received
14 from the "stolen material" is relevant. That is not what's
15 relevant. It is not the benefit that the -- that the
16 purported thief receives. It is the damage to the person
17 from whom it is stolen. Okay. So the entire construct that
18 there would be some relevance to whether or not Mr. Ross
19 profited from the "stolen material," is simply legally
20 mistaken.

21 THE COURT: You may be correct. Frankly, that
22 argument wasn't articulated in the papers.

23 MR. SKOLNIK: I think we did make it in passing
24 analysis --

25 THE COURT: You might have alluded to it.

1 But beyond that, I -- I just believe that at this
2 point, based on the showing that's been made, it's -- it's
3 too far afield.

4 MR. SKOLNIK: Well -- and I raise the point,
5 Your Honor, only because I -- I suspect, if I don't already
6 know, that that same theory will permeate some of the other
7 discovery that -- that Mr. Crockett and Mr. McGuire and
8 Mr. Leonard want to pursue here with respect to other
9 witnesses to try to ferret out the degree to which Mr. Ross
10 has profited from the supposed theft of this material. And
11 what I am saying is that all of that is irrelevant because it
12 is not the legal element of a claim of misappropriation.

13 THE COURT: Okay.

14 Mr. McGuire.

15 MR. MCGUIRE: Judge, your ruling stands, as you
16 made it?

17 THE COURT: Yeah.

18 MR. MCGUIRE: Thank you.

19 THE COURT: All right. What is -- what's next?

20 MR. SYLVESTER: All right. Thank you, Your Honor.

21 A few things on my end, I suppose. And I
22 appreciate the Court having us, and I guess my August 10th
23 letter sort of swung the door open for us to get in here, and
24 I appreciate that.

25 THE COURT: Right.

1 MR. SYLVESTER: A few suggestions, I suppose. If I
2 might make some, just trying to be practical in terms of
3 timeline. I hear Your Honor about sort of where this might
4 fall in terms of timing. So I would just say that with
5 regard to where we see this, it's somewhat -- the dates, you
6 know, we want to make sure we don't put the cart before the
7 horse in terms of how the dates fall out. What I mean by
8 that, is if we're dealing just with the list, you know, maybe
9 what we need to do is close the list, if you will. And it
10 would seem to me that if we're dealing with the list of
11 depositions, perhaps one way of going about it is you would
12 say let's close fact discovery by -- and let's pick a day,
13 and I would -- we would take the position, mid-December, you
14 know, with -- because nothing's going to happen last two
15 weeks in December anyway, so --

16 THE COURT: I want to make one comment. I -- I'm
17 sorry to interrupt you.

18 MR. SYLVESTER: Oh, I'm sorry.

19 THE COURT: I want to make sure that when we talk
20 the close of fact discovery, that's also the close of any
21 discovery disputes be decided by then. I want everyone to
22 understand that. And I'm not looking for any more, but I
23 have a feeling -- you never know.

24 MR. SYLVESTER: Let's hope not, but --

25 THE COURT: Okay. But go ahead.

1 MR. SYLVESTER: But what I'm suggesting is that
2 if -- you know, we have to sort of work off a list. And one
3 comment I heard is maybe there would be more people. And
4 perhaps one thing we take -- get from today is sort of close
5 the book. We're done this for seven and a half years. There
6 is -- the names have all been out there. And whatever we're
7 going to do, if it's on this list, if this is the universe of
8 deps that we have to deal with, let's just deal with it. You
9 know, and it seems to me that we deal with it -- try to deal
10 with it by the end of this year. And then let's get the
11 motions teed up. And I would suggest by, say, a 2/15 service
12 date, February 15th. That would be our suggestion.

13 But there's just a couple of points, and I --

14 THE COURT: Right.

15 MR. SYLVESTER: -- I hate to bother the Court with
16 minutia on the lists.

17 THE COURT: You're not bothering me. Go ahead.

18 MR. SYLVESTER: On the list itself. One thing that
19 we -- I suppose counsel has to figure out, because it could
20 add a substantial amount time to the date set in concrete, is
21 what is going to happen with regard to the deposition of
22 Ms. Moody, who is located outside the U.S. If counsel's
23 going to pursue that through the Hague, then any time frame
24 that Your Honor sets is not going to work, because it's going
25 to take far longer than that to simply get that process to

1 where it needs to be to have her sit for a deposition.

2 I just raise that because it's sitting there, it's
3 an issue, and that -- and our position, I suppose --

4 MALE SPEAKER: We're not going to pursue the Hague.

5 MR. SYLVESTER: But I don't know what other
6 counsel's going to do, but I just wanted to raise that as an
7 issue as I look at the list.

8 MR. CROCKETT: Could I address that, Your Honor?

9 THE COURT: Sure.

10 MR. CROCKETT: Sorry to interrupt.

11 THE COURT: Go ahead.

12 MR. CROCKETT: Ms. Moody is really an important
13 witnesses because she's the one that did the Interfor
14 investigation, not Mr. Aviv, so she -- you know, we've got
15 this countersuit against my client and the other cross -- the
16 other crossdefendants, and she did all the work, yet she's
17 not available. And, yes, we would have a difficult time in
18 taking her deposition.

19 However, when she settled with Interfor, she signed
20 a settlement agreement, agreeing to -- or not with Interfor,
21 but when she -- when she settled with, I think it was the --
22 yeah, with the Rick Ross Institute, she signed a settlement
23 agreement agreeing to make herself available voluntarily for
24 a deposition in Ontario. And -- but they're not calling her.
25 So we would request a consideration of an order invoking that

1 settlement provision asking her to come to Ontario so that we
2 can take her deposition and avoid all this.

3 THE COURT: Is there any opposition to that? It
4 seems to make sense.

5 MR. SKOLNIK: Um --

6 THE COURT: I don't know how much jurisdiction I
7 have over that.

8 MR. LANDY: I -- I used to represent Ms. Moody,
9 she's no longer a party in the case. She is a party to the
10 settlement agreement. That's a matter of contract.

11 You -- Your Honor, if I may take a couple of steps
12 back with respect to this issue and address the broader
13 question of how much discovery we should continue to have
14 here, because it think it bears directly on how Ms. Moody
15 should be addressed.

16 As the Court's well aware, the discovery has been
17 going on for years.

18 THE COURT: Yeah.

19 MR. LANDY: And a number of the witnesses that
20 we're still discussing are not new to this story. Ms. Moody
21 was an employee of Interfor, and she interacted frequently
22 with individuals associated with plaintiffs NXIVM at the time
23 that they had a relationship. Everybody's known about her
24 for a long time. She was a party to this case.

25 She ceased to be a party to this case in early 2009

1 when, over the objection of plaintiffs, she voluntarily
2 dismissed her cross-claims with prejudice.

3 In the briefing papers for that document, I
4 submitted a declaration to the Court, Your Honor, identifying
5 her location as the United Kingdom. So she's been -- all
6 parties have known about her involvement for years. Her
7 location has been disclosed for years. When Mr. Aviv's
8 deposition, the first three or four days occurred in the
9 summer of last year, it was made painstakingly clear that she
10 was principally involved in the Interfor investigation of
11 Mr. Ross. There is no question that she is a relevant
12 witness. The question is whether it is acceptable now,
13 coming to the end of 2010, that we extend discovery in order
14 to permit a long process to compel her deposition when it
15 could have been taken years ago. It's always been there.

16 Now, with respect to the settlement agreement,
17 Mr. Crockett is characterizing it correctly: She agreed in
18 part of consideration for the dismissal of Mr. Ross's claims
19 against him, that Mr. Ross would have the contractual right
20 to her cooperation in attending a deposition in Toronto
21 because of immigration -- her immigration status in the
22 United States: She's not permitted to return.

23 But I don't know, and I agree -- I will admit I've
24 not researched this, whether the Court has jurisdiction to
25 force a party to invoke a contractual right that they gained

1 in settling a case within the same case. And I think before
2 we do that, we'd have to have some briefing on that.

3 THE COURT: Can you -- can you hang on for one
4 second.

5 MR. LANDY: Yes, Your Honor.

6 (Pause in proceedings)

7 THE COURT: Yeah, I guess, to re- -- I mean I
8 understand your points. There are -- a number of things were
9 said, and then I'll hear from Mr. McGuire.

10 One, I'm not sure I was talking about extending
11 discovery. I don't see any reason why we can't do this
12 deposition, to the extent it's possible, within the discovery
13 period, one.

14 Two, she was a party to this case. To the extent
15 that she is a party to this case, there is Supreme Court
16 authority and other authority, which allows the Court to
17 require her deposition. I actually wrote a little opinion on
18 that in another case. The wrinkle, of course, is that she
19 has settled and was voluntarily dismissed, I presume.

20 MR. LANDY: Which --

21 THE COURT: You're reminding me this isn't in
22 recent papers. There's certainly no question that those type
23 of agreements can be enforced. Whether they're easily
24 enforceable in the same case is another story.

25 So what I'm saying, I think it is possible to -- to

1 try to secure Ms. Moody's deposition without invoking the
2 Hague. I don't remember if Canada is a signatory or how it
3 works. But I appreciate your points, that, you know, someone
4 will have to deal with some of these issues.

5 And then the question becomes, even as a party, if
6 I use the authority I have to require her deposition, what
7 sanctions would be available if she refused. I mean, she is
8 in another country.

9 And I think so, Justin -- yeah, we're just going to
10 get a cite. I think it was actually a published opinion
11 where I dealt with this, so I'll give you the cite. I don't
12 know if it'll be helpful or not.

13 So I appreciate your points. But as I recall,
14 Ms. Moody was a -- there is a counterclaim in this case,
15 that --

16 MR. LANDY: That she had brought and then
17 voluntarily dismissed.

18 THE COURT: I know, but --

19 MR. LANDY: There should be --

20 THE COURT: -- there's still -- isn't there still
21 a --

22 MR. LANDY: There's still a counterclaim by her
23 former employer.

24 THE COURT: Right. There's still the Juval Aviv,
25 Interfor has claims for. And then we also have -- well, you

1 know, I don't know. I don't remember exactly where these fit
2 in. I know Ms. Franco has her counterclaim. And of course,
3 we -- the Ross Institute and Ross has the intrusion upon
4 seclusion counterclaim.

5 MALE SPEAKER: Correct.

6 THE COURT: I remember Ms. Moody being relatively
7 important. Now, I think if you are saying that they should
8 have moved more quickly, I tend to agree.

9 But I think Mr. McGuire wanted to be heard on this.

10 MR. LANDY: I'm almost done, Your Honor.

11 THE COURT: Oh, okay.

12 MR. LANDY: What I was -- originally when I
13 started, but I -- my comment was this illustrates what
14 Interfor's position on how discovery should proceed. We
15 have -- as I stated to Your Honor, we have known about a
16 number of these witnesses for a long time. Some of them are
17 more relevant; some of them may be less. There's probably an
18 argument that could be made about a number of them. But I
19 think that in creating a deadline, we should just -- we
20 should be mindful that we have experienced counsel
21 representing all parties. They should be given a time frame.
22 And they can then prioritize what do they really think is
23 necessary, given the fact that we have one month, two months,
24 whatever it may be, because to say we're going to start the
25 clock now and from this point on, now we're going to -- we're

1 finally going to decide who we really want, notwithstanding
2 the fact that discovery's been open for years, and then
3 figure out how long it's going to take it, will -- will just
4 drag us on into the future, and, you know, I'm compelled to
5 take this position because my -- my client's primary damage
6 is on an identification claim of being dragged through this
7 case.

8 Now I'm finished, Your Honor.

9 MR. MCGUIRE: Thank you, Mr. Landy.

10 Your Honor, almost from the time we got involved in
11 this case, which was roughly two years or so ago, I've had a
12 number of discussions with Mr. Lack, Mr. Landy's partner, and
13 Mr. Landy about a deposition of Ms. Moody. Early on, I was
14 told that they really didn't know exactly where she was. She
15 was either in the United Kingdom or was someplace in the
16 Middle East, Lebanon or someplace.

17 MR. LANDY: For a time, we believe she was in
18 Nepal.

19 THE COURT: Nepal.

20 MR. LANDY: Nepal.

21 MR. MCGUIRE: It was someplace.

22 THE COURT: I remember Nepal.

23 MR. MCGUIRE: A few miles -- a few miles outside of
24 Newark.

25 In any event, we weren't to get her. And I have no

1 reason to doubt Mr. Lack or Mr. Landy when they said they
2 honestly didn't know exactly where she was, because at the
3 time we were asking to produce her voluntarily, and that's
4 when this whole concept of maybe Ontario, and then a motion
5 was filed to dismiss. And in our opposition papers, we
6 pointed out that if she were to be dismissed, we're losing
7 her as a party, and therefore we'd have no right to take her
8 deposition; we'd be left in a no man's land.

9 And so we've tried to take her deposition, Judge.
10 For a long time, they didn't know where she was. And then
11 when the motion was filed, it was acknowledged she was in the
12 United Kingdom. I don't think we were ever given a specific
13 address, but they -- they did indicate she was in the United
14 Kingdom.

15 So to say that we weren't trying to take her
16 deposition is not exactly the fact. We have been trying to
17 take her deposition, and we pointed that out in the motion
18 papers in opposition to her dismissal.

19 THE COURT: I remember that now, Mr. --
20 Mr. McGuire, and I had forgotten that. But that was in the
21 motion.

22 MR. LANDY: Just -- just a brief point to that. In
23 those papers, we did identify her as now residing in the
24 United Kingdom. And those papers were filed February 10th,
25 2009, over a year and a half ago.

1 THE COURT: Yeah, I mean, we haven't set a schedule
2 yet, but I guess the idea is Mr. Crockett, Mr. McGuire, you
3 just spoke that there's an important witness. I think you
4 should, you know, take steps immediately, whatever they are,
5 to get her deposition.

6 MR. MCGUIRE: Well, no question she's an important
7 witness, Judge, because Mr. Aviv has conceded that she was
8 the person who did the investigation.

9 MR. CROCKETT: Well, in that regard, Your Honor, we
10 would request an order directing the Interfor and the Ross
11 parties to cooperate and -- and invoke their settlement
12 provision requiring her to attend the deposition voluntarily
13 in Ontario. That's what we're asking for.

14 THE COURT: Does anyone oppose that?

15 MALE SPEAKER: I'm not --

16 MR. LANDY: For the moment, we would oppose it. I
17 don't know if it's permissible to force a party to invoke a
18 contractual right in order to facilitate discovery. Of
19 course, I'm not the holder. My client is not the holder of
20 that contractual right. Mr. Ross is the holder of that
21 contractual right. But --

22 THE COURT: Well, I --

23 MR. LANDY: -- without looking into the issue, I'd
24 like to reserve the right to formally oppose it.

25 THE COURT: Everyone can reserve the right. I will

1 tell you as the magistrate judge presiding over the case,
2 which giving me unlimited authority, that the entire factual
3 scenario, the opposition to the dismissal that was filed by
4 the plaintiffs, the settlement agreement with the provision,
5 et cetera, in other words, I think I would be disposed to
6 take whatever steps were within my power to force this
7 deposition to -- to occur. But I can't rule on anything
8 before -- before that.

9 The cite of the case I'm -- really it may not be
10 directly on point, but may be helpful, perhaps assisting, is
11 657 F. Supp. 2d 525, Schindler Elevator against Otis
12 Elevator. It was a patent case. I -- I don't remember
13 exactly how helpful it will be.

14 But I think the party -- you should start to move,
15 Mr. Crockett; in other words, perhaps write -- write to them,
16 send a letter. I -- you know, I'm not -- I don't have that
17 kind of law at my disposal, but -- enforcing that agreement.
18 But my general sense is that, yes, the interest of justice
19 would be that everyone will take steps to make that
20 deposition happen.

21 What do you think, Mr. Skolnik?

22 MR. SKOLNIK: Your Honor, whether or not that
23 deposition happens, I think is really a matter of
24 indifference to -- to Mr. Ross. I can almost anticipate that
25 if it takes place, we are very likely not going to attend.

1 So, I guess, from procedural point of view, I would certainly
2 not stand in the way of having it happen that. Nor do I
3 think it's necessary or appropriate for -- for me and my firm
4 to have to be involved and incur expense to implement a -- a
5 settlement provision that we have no interest in
6 implementing.

7 So if Mr. Crockett and Mr. Landy and perhaps with
8 Your Honor's help can figure out a procedural way to have
9 this happen, I'll -- I'll cooperate, but I can hardly see
10 why -- why I should be taking active steps for a deposition
11 in which I have no interest.

12 MR. CROCKETT: It, Your Honor, takes his active
13 step. It takes his active step to get it because he holds
14 the right to compel her to come to Ontario. So we will send
15 a letter to Mr. Skolnik asking him to take that active step.
16 If he declines, then we'll turn to Your Honor with the
17 appropriate authority.

18 THE COURT: Well, I mean, what troubles me,
19 Mr. Skolnik -- I don't know if it "troubles," but there's
20 something that seems wrong about it is that Judge Cavanaugh
21 overruled Mr. McGuire's opposition to the dismissal, I think
22 in part, you know, based on this reason, this had -- this was
23 their opposition. And the Court then entered the voluntary
24 dismissal, which it needn't -- it had the discretion not to
25 do and certainly could have set conditions.

1 So I would encourage you to -- to -- well, to at
2 least look at that closely and see what you think you have to
3 do. I don't know what else to say. That's what troubles me.

4 MR. SKOLNIK: Well, okay. And as I say,
5 Your Honor, I -- I certainly -- I certainly don't oppose
6 doing what is -- what is necessary and appropriate. What
7 I -- what I think I'm saying is if, in fact, that was part of
8 the papers on the Moody dismissal, I don't remember. I don't
9 think it was. But we took no position in that. That was
10 really a dispute, again, between -- between NXIVM and
11 Interfor. Ross was not involved in Moody's motion to
12 voluntarily dismiss. So how it is that that provision in
13 Ross's settlement agreement became the predicate for Judge
14 Cavanaugh's -- I mean, it's something of a mystery to me.

15 THE COURT: I don't know if it's a predicate, but
16 let's face it, someone put that in there for a reason, and
17 the reason seems clear, that this person's deposition may be
18 deemed important to a party in this case. And I would think
19 the Court's power would line up behind making that happen.

20 MR. SKOLNIK: Well, I guess -- I guess the question
21 in my mind is, if I am -- if I am asked on behalf of Ross
22 to -- to implement Ross's rights under that agreement, I'm
23 not quite sure what the nature of that implementation is. Do
24 I have to issue a subpoena? Do I simply write or call
25 Mr. Landy and say, we'd like the deposition? I mean --

1 THE COURT: I don't know the answer to that.

2 MR. CROCKETT: I'll do it, Your Honor.

3 THE COURT: Okay.

4 MR. CROCKETT: Mr. Skolnik has to ask Mr. Landy to
5 bring Ms. Moody to Toronto -- or Ontario at Interfor's
6 expense. That request needs to go to Mr. Landy. Interfor
7 pays for it. Now, we are willing to pay for that, jump in
8 and pay for those expenses to bring her to Ontario. But the
9 request first has to go from Mr. Skolnik to Mr. Landy, and
10 then Mr. Landy chases down Ms. Moody and pays for her to come
11 to -- to Canada. That's how it works.

12 MR. SKOLNIK: Can I make that request, now,
13 Your Honor? And what am I obligated to do if Mr. Landy
14 refuses or Ms. Moody refuses?

15 MR. CROCKETT: Well, we'll do -- we can deal with
16 that later. But right now, I need that request to Mr. Landy.

17 MR. LANDY: I don't have the agreement in front of
18 me, so if you make a request, you're going to have to do it
19 in writing.

20 One thing, just to note --

21 MR. CROCKETT: Well, he hasn't made the request
22 yet. Maybe he can make the request --

23 MR. SKOLNIK: No, I -- yes, I so request.

24 MALE SPEAKER: Great.

25 THE COURT: All right. Well, the request was

1 deemed to be made.

2 MALE SPEAKER: A momentous moment.

3 MR. LANDY: Well, Your Honor, I brought that up as
4 a possible fly in the ointment, and that's why. I didn't
5 want this whole issue to destroy potentially our schedule
6 because we're dealing with someone who was outside the U.S.

7 THE COURT: Yeah. It's a good point. We don't
8 have a schedule yet. We're going to. But, you know, this
9 was a name -- I mean I would think that the -- the Interfor
10 folks would want someone to defend --

11 MR. LANDY: The only other issue on the letter is
12 something I'm sure I can work out with counsel, and that's
13 the location of Ms. Keeffe's deposition. I understand --
14 he's said that she is, you know, unemployed, single mother,
15 but I just heard that she's willing to pay for Ms. Moody to
16 fly all the way to Toronto, so I suspect she has enough money
17 to come to New Jersey for a deposition.

18 The only other issue that we have is and we're
19 willing to just rely on our papers with regard to the Bouchet
20 [phonetic] documents. And we have a letter to Your Honor
21 May 25 of 2010.

22 THE COURT: Yes.

23 MR. LANDY: And that's what we'll just -- we're
24 willing to rely on our papers.

25 THE COURT: Yeah, I -- and what happened is, I

1 | guess to review that, is there was a May 25th letter from
2 | Mr. Kofman and Mr. Sylvester. And then there was the
3 | discussion about that. And I believe there was a letter from
4 | Mr. Crockett, if I can find it here. And what happened is a
5 | Redweld of materials was provided to the Court by
6 | Mr. McGuire, and we reviewed the Redweld. Yeah. Now, this
7 | was done in a somewhat informal manner in the sense that -- I
8 | guess I ought to review some of the arguments with respect to
9 | this, so just bear with me, because I have -- I have given it
10 | some thought and I've gone over it. But the letter of --
11 | that actually came from Mr. McGuire was that there were
12 | redactions of names of students, supporters, and there's a
13 | United States Supreme Court case cited on raising the First
14 | Amendment, essentially, freedom of association.

15 | MR. MCGUIRE: That's my argument.

16 | THE COURT: And there was also credit card numbers
17 | redacted. And then there were executive committee minutes
18 | and things like that, that were produced in an unredacted
19 | form. And we reviewed those documents. Just bear with me.
20 | I want to get my list. So -- sorry for the delay.

21 | Okay. I guess the -- with respect to Ms. Bouchet's
22 | documents, the argument was made that -- that the plaintiffs
23 | waived their right to object because they didn't move to
24 | quash the deposition -- the subpoena. And I'm going to deny
25 | and overrule that objection. In the context here, I'm not

1 | sure that they knew what documents were -- were there. So I
2 | guess -- just remind me, the documents that -- the
3 | Ms. Bouchet's documents, did that have to do with the
4 | contributions and the redactions, Mr. McGuire?

5 | MR. McGUIRE: I think the only redactions, Judge --
6 | and I hope I'm stating this accurately -- the only redactions
7 | were the names of two or three students whose names were
8 | certainly -- if memory serves correctly -- on other documents
9 | that have been produced. But these had to do with specific
10 | contributions. If memory serves correctly, I think there
11 | were only three or four redactions. I don't think they
12 | were -- do you have them in your letter, Tony? I don't have
13 | them written --

14 | (Simultaneous conversation)

15 | DEFENSE ATTORNEY: My recollection, Your Honor, was
16 | that there was the redaction of the names of certain
17 | students. Ms. Bouchet has produced genealogy reports which
18 | were intended to show how many students -- particular
19 | students referred to the organization. This goes to NXIVM's
20 | damage claim was something along the lines that each student
21 | who left would have brought in six more students. And
22 | plaintiffs -- Ms. Bouchet mentioned at her deposition that
23 | there were genealogy reports, which would indicate that
24 | students brought in far fewer than six other students. And
25 | so we asked for the genealogy reports. And what we got was

1 redactions that were impossible to read whether or not
2 Ms. Bouchet's statements were accurate or not. So we wanted
3 the name of the students.

4 There were also redactions of the names of coaches.
5 Ms. Bouchet was willing to produce documents that identified
6 the income that each coach had. And that, again, goes to the
7 loss of business, that claim that existed. And so we needed
8 that information to assess the damages claims that plaintiff
9 has made, which according to Ms. Bouchet, the documents would
10 indicate that the claims -- the damages claims were wildly
11 inflated.

12 And that's -- so that's the nature of the documents
13 that we're requesting. And we need to see those and
14 obviously the names of students, and so we did not object to
15 redaction of credit card information. But the names of
16 students and coaches, we're entitled to to assess the damages
17 claims.

18 The other issue not involving redactions was the
19 board meeting --

20 THE COURT: I'll get to that.

21 The -- I'm going to rule in the plaintiffs' favor
22 in terms of the redactions. In other words, I think the --
23 it's sort of the reverse of what we were dealing with on --
24 it's not the reverse, but it's like -- it's somewhat
25 analogous to what I was discussing with Mr. Skolnik before

1 about the names of people who complained. And I think that
2 you can discern the sales figures by evaluating the numbers.
3 But I'm not going to order the -- the names at this point.
4 It's -- to me, it's analogous to what we were talking about.
5 Yes, Mr. -- you didn't have any papers on this, Mr. Skolnik.

6 MR. SKOLNIK: I didn't, Your Honor, only --
7 although -- although the issue had been raised at a
8 deposition actually by both Suttons' counsel and I, but we
9 decided among us that -- that the Riker firm would carry the
10 ball on this.

11 But I guess -- I guess my concerns here are really
12 twofold. One, is that it's one thing to -- to eliminate some
13 names. The problem here is that these are -- these are
14 documents that go to the very heart of NXIVM's continuing
15 damage position, that its damages are predicated on certain
16 assumptions about the nature of the way in which one student
17 brings in others. I will refrain from calling it the NXIVM
18 Ponzi scheme, but of course that's what it is. Their damages
19 are predicated on that structure.

20 We are now precluded because of these documents,
21 which -- which Barbara Bouchet had, from being able to dig
22 into the veracity of that very position.

23 I also want to just remind everybody that this
24 issue arose -- these were documents that actually were
25 subpoenaed from Bouchet. She was, in the normal course of

1 events, going to produce them to us, to the Sutton firm -- to
2 the Riker firm and to Lowenstein. As a courtesy to
3 Mr. McGuire, based on his claim that there was some concern
4 that there might be attorney-client privileged material in
5 these documents, you know, they had been nervous about
6 Barbara Bouchet potentially having attorney-client materials.
7 I mean, they gave Barbara Bouchet a hard time at every
8 conceivable jurisdiction on every conceivable issue; that was
9 one of them.

10 So based upon some assumption that she might be
11 turning over attorney-client documents, we, as a courtesy to
12 these gentlemen allowed them to review for attorney-client
13 privilege. There was not a single page from those papers
14 that was, in fact, withheld on the basis of attorney-client
15 privilege. Not one. All of these redactions, all of these
16 withholdings were because NXIVM decided that they didn't like
17 us to have them, that they're not relevant. Notwithstanding
18 a confidentiality order. Notwithstanding representations
19 from counsel. So --

20 THE COURT: That's a fair point. That is the way
21 it came about.

22 On the other hand, we're at this stage now. I'm
23 trying to deal with discovery. I limited the discovery of
24 some of the names of the complainers, the alleged -- or the
25 people who contacted your client. My feeling is at this

1 stage, it's -- it's a little bit of a fishing expedition
2 there too. That's my feeling. That they have the numbers.
3 This goes to damages anyway, which presumably is not even
4 going to be dealt with until later. Are -- is Bouchet's
5 deposition been -- is going to be taken or what?

6 MR. SKOLNIK: It's -- it's in process.

7 THE COURT: Oh, it's in process. I forgot --

8 MR. SKOLNIK: I have not had an opportunity to
9 question her yet because -- well, for various reasons.

10 THE COURT: I just didn't see the need for the
11 names at this point. I thought that might just expand things
12 more. Just as I felt that the names of the people -- the
13 argument is to assess the credibility of -- of these folks,
14 when you have the information on the -- on the damages,
15 which, you know, we can start questioning everyone about --
16 about that.

17 MR. SKOLNIK: Well, okay, then, Your Honor, may
18 I -- may I simply suggest, then, that -- that whether or not
19 these documents should be produced at some time in the future
20 with respect to damages be reserved and that we accept it
21 now. Again, my concern is that these documents are very,
22 very crucial, indeed, to NXIVM's damage claims. They have
23 very significant damage claims against -- against our
24 clients. They are looking for money based upon the fact that
25 Ross has interfered by the -- by the things that he puts on

1 his website with NXIVM business. That's the heart of their
2 damage claim.

3 THE COURT: Let me --

4 MR. SKOLNIK: These documents go to that.

5 THE COURT: Let me say, I'm -- my ruling is going
6 to stand. Right now, I'm going to not order the names of
7 the -- the redactions are fine.

8 If you come up with further information and things
9 change and Ms. Bouchet's deposition and you want to
10 articulate this -- what's being articulated to me now wasn't
11 entirely done in the -- in the letter from Riker. And you
12 put in no papers on this one. I understand your point. But
13 I'm not convinced at the moment. If -- it'll be without
14 prejudice. If you come up with some persuasive information
15 that it's necessary to identify these folks, I'll take it
16 under advisement.

17 MR. SKOLNIK: Thank you.

18 THE COURT: As to the minutes of the board
19 meetings, I guess the assertion was that the minutes are
20 relevant because they would deal with NXIVM's marketing
21 efforts and NXIVM claimed there were damages as a result of
22 the posting of the trade secrets on the website. We looked
23 through these, and I just don't see any information that
24 would be reasonably calculated to lead to the discovery of
25 admissible evidence, so I'm not going to order them produced.

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DEFENSE ATTORNEY: That's fine, Your Honor. We have not seen them.

THE COURT: I know you hadn't. I mean this is the way it was done. But we did -- I will tell you that we studied the documents.

DEFENSE ATTORNEY: Thank you, Your Honor.

MR. McGUIRE: Would you like an order on that, Judge?

THE COURT: Sure. Sure.

Are there any other outstanding issues, other than anything that had been raised, other than now imposing a schedule?

Mr. McGuire. Oh, did you say something?

MR. McGUIRE: I just said I think you're right.

THE COURT: Yeah. So there's no other issues. So the question is a discovery end date, which is what Judge Cavanaugh has directed me to use.

MR. SKOLNIK: Your Honor?

THE COURT: Yes.

MR. SKOLNIK: I just wanted to clarify, are you inclined or disinclined to spend any time going down the list of the requested depositions here to decide whether or not they should or they should not go forward?

THE COURT: What did you think? I haven't looked

1 at it, folks. I don't know. I mean, I can talk about it.

2 But I don't -- would that be helpful?

3 MR. MCGUIRE: Judge, I don't think it would be
4 helpful at all.

5 THE COURT: Okay.

6 MR. MCGUIRE: Everybody knows the names that are on
7 that list. They certainly have relevant information or
8 information that could lead to the introduction of relevant
9 evidence. And it would be a waste of time to go down here
10 and single out one or two and say, oh, they have no
11 knowledge. Every person on that list has been mentioned in
12 depositions or in answers to interrogatories. They
13 certainly, we believe, are in possession of information that
14 would be relevant in this litigation.

15 MR. SKOLNIK: Your Honor, that's simply not true.
16 For example, and I get -- maybe it's the only example that
17 simply has never been mentioned in interrogatories, in
18 written discovery, in depositions, there was a name here,
19 Jerome Levy. Now, my understanding from Mr. Crockett is that
20 Jerome Levy's name was on some sort of a list of Mr. Ross's
21 telephone conversations. I can tell you that we were first
22 told that they had served Mr. Levy. I then contacted
23 Mr. Levy through email to say do you know who Mr. Ross is?
24 Do you have any idea? Have you ever spoke to him? To which
25 he said, I haven't been served, I have no idea what you're

1 talking about, and I don't know who Mr. Ross is.

2 They then subsequently said, oh, we made a mistake,
3 we never did serve Mr. -- Mr. Levy. His name remains on this
4 list, and the entire predicate is because his name appeared
5 on some telephone log of -- that someone at Mr. Loss's phone
6 once called Jerome Levy, who claims he's never heard of
7 Mr. Ross, he's never been mentioned in anything else here.
8 So there's one.

9 And as long as I'm standing, let me also direct
10 Your Honor to -- to Mr. Crockett's statement about Sara
11 Bronkman [phonetic], who I think Your Honor knows is fairly
12 crucial here.

13 THE COURT: Yeah.

14 MR. SKOLNIK: Declined by plaintiffs until Ross
15 completed. Well, I was also struck this morning listening to
16 Your Honor talking to these lawyers beforehand making the
17 statement, we don't wait for the other side to produce
18 discovery. I mean, we have told them for months now, that we
19 want Sara Bronkman's deposition. And at first, we were going
20 to be given a date. You'll have it next week, oh, and now,
21 well, no, you can't have her until Ross is done.

22 THE COURT: You know, I did say that before, and
23 you're right, there's no order in the federal rules. You
24 know, of course that -- or just sitting here for many years
25 and practicing, that often the plaintiff's depositions do go

1 first. Aren't -- are you not planning to complete Mr. Ross
2 soon or?

3 MR. SKOLNIK: Well, now that we have a ruling from
4 Your Honor, I think we will be able to --

5 THE COURT: So, I mean, maybe you don't have a
6 problem with Ms. Bronkman's deposition afterwards, then. I
7 don't --

8 MR. SKOLNIK: Well, okay. But I guess -- I guess
9 what I'm saying is now that there's -- now that there's
10 clarity about -- about the nature of the Ross deposition, we
11 will attempt to schedule that with the other side.

12 What I don't want to have happen is if for one
13 reason or another, one or another counsel, either on this
14 side of the room or the other, has a difficulty with days
15 that are available for Mr. Ross, and the meantime, we're
16 trying to schedule Sara Bronkman, but I keep hearing from
17 Mr. Crockett, no, no, we're not going to give you any dates
18 for Sara Bronkman until we resolve Ross. There's just no
19 basis for it.

20 THE COURT: I would encourage counsel to try to
21 start working on your calendars. We know that we're going to
22 have a definite end date, and that's going to be the end
23 date, so I don't know what else to say.

24 MR. SKOLNIK: Thank Your Honor.

25 THE COURT: I'm thinking about February 15th. What

1 do you think about that? That's plenty of time, folks.

2 MR. McGUIRE: It might be difficult, Judge. I
3 recognize that it's five months approximately from now, and I
4 don't want to sound unreasonable, but I do anticipate some
5 difficulties with serving a number of these witnesses and
6 taking their depositions. And there are occasions, Judge,
7 where you have one, two, four firms, and Mr. Skolnik is not
8 incorrect this time -- he is most times, but he is not
9 incorrect this time -- in pointing out that it's difficult on
10 occasion to get everybody to agree on a date. Those are the
11 problems. And I'm trying to be realistic about it.

12 THE COURT: All right. Here's what I'm going to
13 do. I'm sorry, Mr. Skolnik, go ahead.

14 MR. SKOLNIK: Your Honor, I was going to say that I
15 think if, anything, February 15th is little bit too far out.

16 THE COURT: I thought you'd say that.

17 MR. SKOLNIK: Yeah, just as general matter, the
18 argument that it is going to be difficult to serve some of
19 these people only arises because here we are years into this
20 case and names are first coming up from the other side that
21 they first have to try to serve.

22 MR. McGUIRE: That's --

23 MR. SKOLNIK: And now using that as a predicate for
24 extending discovery yet further into the future, I don't even
25 have to finish the sentence, Your Honor.

1 THE COURT: And I appreciate your argument. I
2 understand. Let me tell you that many of these thoughts were
3 taken into account when I sat down with the district judge
4 this morning on the case.

5 So I'm going to arbitrarily impose March 1. I
6 don't think anyone can have a fair argument with that. I
7 think Judge Cavanaugh is being extremely flexible and to some
8 extent generous in terms of the time, given the case and --
9 and that's what we're going to do.

10 MR. McGUIRE: Thank you, Judge.

11 THE COURT: I'm going to enter an order to that
12 effect. So the idea is now to move very quickly. When you
13 have discovery disputes, raise them with me quickly with a
14 short letter. I'll try to get on the phone with you. And we
15 may have some regular meetings, if we need it. I'm happy not
16 to have any discovery disputes, believe me, folks.

17 MR. LANDY: Your Honor, then, dispositive motion
18 practice 60 days after that? Something along those lines.

19 THE COURT: That's fine with me.

20 MR. LANDY: Is that all right?

21 THE COURT: Yeah.

22 MR. CROCKETT: Your Honor, I should have spoken up
23 a little earlier. There was one remaining issue on the Ross
24 protective order that wasn't mentioned. And I just want to
25 put it out on the table and see if it still exists. And

1 | there was some sort of concern about asking Mr. Ross about
2 | his communications with the Karen Snyder [phonetic] --
3 | Kristin Snyder family. And I didn't -- I -- I didn't hear
4 | that resolved today. And I just want to know if that's still
5 | an issue.

6 | THE COURT: I think that she wasn't -- what, no one
7 | answered the phone, or they said they didn't know -- what was
8 | the story with them?

9 | MR. SKOLNIK: Well, Your Honor, I -- I like to
10 | think it was subsumed by your ruling earlier about
11 | communications years after this case were filed. This was a
12 | conversation that Mr. Ross had with someone who answered a
13 | phone at the former home of the dead Kristin Snyder, years
14 | after this case was filed. And they wanted to know about
15 | Mr. Ross's conversation. I think he spoke to what they spoke
16 | about, and Mr. Ross refused to answer because, again, this is
17 | another person who we are trying to protect from being
18 | harassed by NXIVM. There is no conceivable relevance to any
19 | information in that, other than their theory of what
20 | Mr. Ross, and -- look, even if Mr. Ross fabricated Kristin
21 | Snyder rolling into the middle of a lake and drowning
22 | herself, there's no more defamation claim here, Your Honor.
23 | It has nothing conceivable to do with the existing claims.
24 | THE COURT: I understand that, and there's some
25 | truth to that, Mr. Skolnik.

1 On the other hand, let's -- we must all acknowledge
2 that this has been discussed. This suicide has been
3 discussed as part of the case. And even in certain papers
4 that you have submitted earlier on in the case, there were
5 assumptions made about what people were doing, and if you
6 remember --

7 MR. SKOLNIK: Your Honor --

8 THE COURT: -- like even on the cruise ship.

9 Now, what I'm saying is I -- what is -- what is the
10 dispute? I mean, I think to the extent that there's -- that
11 the -- that there was information about the alleged suicide,
12 why can't that be generically answered? What's the
13 objection?

14 MR. SKOLNIK: The -- well, I'm not quite sure what
15 you mean by "generically answered."

16 THE COURT: Well, I --

17 MR. SKOLNIK: -- I --

18 THE COURT: I don't know what -- no one gave me
19 questions and answers here. I'm not sure what -- was there
20 direction not to answer the question or what happened?

21 MR. SKOLNIK: Mr. Ross refused to answer the
22 question. They wanted to know who he spoke to on this date
23 years after this case was filed.

24 THE COURT: But --

25 MR. SKOLNIK: Years after the material was --

1 THE COURT: I guess what I'm saying is -- what
2 about what was said rather than who. Because it -- that
3 might just answer the problem. I don't -- I'm trying to
4 protect -- I'm trying on some level to keep additional names
5 out of it. And I guess Mr. Crockett --

6 MR. CROCKETT: Your Honor, if I may respond,
7 Your Honor?

8 THE COURT: Go ahead. It would be great if
9 Mr. Ross just answered generically, it was a family member or
10 and acquaintance or it was Kristen Snyder herself.

11 MR. SKOLNIK: He already told you it was not
12 Kristin Snyder.

13 MR. CROCKETT: But I would like to get the
14 substance of the response. What was communicated.

15 MR. SKOLNIK: Why? Against what claim, Bob? What
16 relevance does it have to what your claims are in this
17 lawsuit? Can you answer me that? Can you tell the judge
18 that? Can you explain to the judge what the relevance is of
19 that conversation?

20 MR. CROCKETT: Would you like me to respond,
21 Your Honor?

22 THE COURT: I know you're speaking to one another.
23 I think -- I hate to defer a problem. I'd rather solve it in
24 advance. But to be honest with you, I -- I have to see the
25 question and the answer. So ask your question. I'm not

1 inclined to identify the person. To the extent that it's
2 already -- he'll identify it's not Kristin Snyder, I think
3 that's good. And if you have to call me at that point in the
4 dep, Mr. Skolnik, call me.

5 MR. SKOLNIK: Okay.

6 THE COURT: Because I'd like to hear the question
7 and the answer and then have it in context. I really -- I'm
8 not sure where this fits in right now.

9 MR. SKOLNIK: Thank Your Honor.

10 THE COURT: All right. I guess I need an order --
11 yes, Mr. McGuire.

12 MR. MCGUIRE: Judge, we have had dif- -- sometimes
13 had difficulties in the past getting together to agree upon
14 dates. And I ask that Your Honor either ask for us to remain
15 after this to talk about dates -- the parties now.

16 THE COURT: Yes.

17 MR. MCGUIRE: Or ask us to agree by telephone one
18 day this week so that we get this ball rolling and not horse
19 around by saying dates out and having people -- and we might
20 object to one of their dates, they might object to one of our
21 dates. I'd like to get these dates set so that we can move
22 forward.

23 THE COURT: I --

24 MR. MCGUIRE: I'll do it either way.

25 THE COURT: I'm so asking. In other words, you're

1 all here now, you might want to try to meet and agree, but,
2 if not, certainly this week, you should all get on the phone.
3 And I may -- I may set up another conference, folks, a month
4 or so out and see where we are.

5 Yeah, what do you think, Mr. Skolnik?

6 MR. SKOLNIK: Your Honor, no, that's fine. And I
7 think we can all get on the phone.

8 My colleague Mr. Dolan has -- has reminded me that
9 there is one other little outstanding issue here. Last week
10 at deposition of Mr. Bjornstat [phonetic], the 30(b)(6)
11 witness for Wellspring, he was questioned -- I'm sorry. No,
12 it was -- it was at the -- the deposition of Mr. Portias
13 [phonetic]. Mr. Portias was questioned using a document that
14 had been produced by David Mandelbaum.

15 THE COURT: Okay.

16 MR. SKOLNIK: Whose deposition is coming up. We
17 have never received those documents.

18 MR. MCGUIRE: They went out on Thursday. You
19 should have them.

20 MR. SKOLNIK: Well, I don't have them, and other
21 counsel apparently has had them for weeks. So, okay. We
22 will now have them.

23 MR. MCGUIRE: There was a mistake on either my part
24 or somebody else's part because when the letter came from
25 Mr. -- Mr. Mandelbaum's counsel, Frank Arleo, there were CCs

1 at the bottom, and they were to Mr. Kofman and was it -- it
2 wasn't -- somebody else. Somebody else. And I guess either
3 I or somebody else assumed they went to everybody. And it
4 was brought to our attention, we used one document from the
5 Mandelbaum deposition at Mr. Portias's deposition, and the
6 documents were sent in their entirety with my apology,
7 Mr. Skolnik, I believe on Thursday, maybe Friday. But I
8 believe Thursday.

9 MR. SKOLNIK: Thank you.

10 THE COURT: All right. I think that does cover it.
11 So I thank you all. I think it was productive, and we have a
12 real plan now.

13 UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

14 THE COURT: Good luck.

15 MR. McGUIRE: Did Your Honor want to set a date for
16 another meeting or not?

17 THE COURT: I'll do that that, Mr. McGuire, but I'm
18 going to do it when I have a court calendar. So ...

19 MR. McGUIRE: Thank you.

20 THE COURT: So I'll set it down.

21 (Conclusion of proceedings at 12:32 p.m.)
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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 60 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

September 27, 2010

Signature of Approved Transcriber

Date

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